Supreme Court, U.S.
FILED
011431 JAN 03 2002
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

BRENDA G.TAYLOR,

Petitioner,

v.

JAMES W. HODGES,
GENE BUINGER, and
BIBB COUNTY PUBLIC SCHOOLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRENDA G. TAYLOR
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22 pp

QUESTION PRESENTED

The trial court's jury charge on quid pro quo and hostile environment sexual harassment was contrary to this Court's decisions in Oncale v. Sundowner Offshore Services, Inc., Meritor Savings Bank v. Vinson, and Faragher v. City of Boca Raton.

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1. The trial court's jury charge on quid pro quo and hostile environment sexual harassment was contrary to this Court's decisions in Oncale v. Sundowner Offshore Services, Inc., Meritor Savings Bank v. Vinson, and Faragher v. City of Boca Raton

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OPINIONS BELOW

The judgment of the appellate court was entered on July 24, 2001, Appendix B. The order denying the petition for rehearing in banc was entered on October 5, 2001, Appendix A. The judgment of the district court was entered on January 19, 2000, Appendix C.

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to 28 U.S.C Section 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights of 1964 provides: "[i]t shall be an unlawful employment practice for an employer… to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC Section 2000e2(a)(1).

STATEMENT OF CASE

Appellant filed her civil action in Bibb County Superior Court pursuant to 42 USC Sections 1983, 1985(3), 1988, 2000 et seq., Title IX of the Education Amendment of 1972, 20 USC Sections 1681 et seq., the First, Fourth, and Fourteenth Amendments to the United States Constitution and OCGA Section 51-1-1. Upon the request of the respondents, the case was removed to the U.S. Middle Court of Georgia.

The trial court granted the respondents summary judgment on petitioner's 1983 due process, free speech and privacy claims. Summary judgment was denied on appellant's Title VII sexual harassment and retaliation claims, 1983 equal protection claims and state tort claims.

During the trial in this case, the court charged the jury on sexual harassment as follows:

The defendant, Bibb County School District, the employer is responsible or liable for the actions of plaintiff's supervisor in plaintiff's claim of sexual harassment, if plaintiff proves by a preponderance of the evidence that, first Dr. Hodges, the plaintiff's supervisor, made intentional sexual advances to the plaintiff, and next, that the sexual advances were unwelcomed by the plaintiff. Third, the acceptance or rejection of the sexual advances were an express or implied condition or the receipt of a job benefit or the imposition of a tangible job detriment. And fourth, the plaintiff's reaction to these supervisor's advances, in fact affected a tangible aspect of her employment.

.....

The plaintiff alleges that she has been forced into a hostile work environment because of sexual harassment. To prevail on such a theory, the plaintiff need not—

excuse me. The plaintiff does not need to demonstrate that any substantial job benefits either were conditioned on submitting to hostile sexual harassment or were denied because of refusing to give into such conduct. Rather, to establish a claim of hostile environment sexual harassment, the plaintiff must prove by a preponderance of evidence that her workplace was permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment

.....

If you find that the plaintiff has proved all of the necessary elements of her hostile work environment sexual harassment claim, then the defendant, Bibb County School District is liable to the plaintiff, unless you find that said employer proved by a preponderance of the evidence that it exercised care to prevent and correct promptly any sexually

harassing behavior. And that the plaintiff, employee, unreasonably failed to take preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Petitioner maintained during the trial that her supervisor touched her on her buttock on two occasions, attempted to kiss her lips, placed his hand on her blouse and attempted to undress her in her school office, phoned the school and told her to come and join him in bed and searched the city of Macon for petitioner when she was on leave from work. Petitioner also maintained that her principal told her that she could "resign", "put out" or "be terminated" when she rejected his sexual advances. Petitioner was given an unfavorable performance evaluation, suspended from her employment and terminated because she rejected her

supervisor's sexual advances and reported his sexual misconduct to his supervisors.

The jury was misled by the erroneous charge on sexual harassment and returned a verdict in favor of the respondents. The appellate court affirmed the trial court's erroneous sexual harassment standard without an explanation.

REASONS FOR GRANTING THE WRIT

This Court has affirmed the principle that Title VII sexual harassment claim is directed at "discrimination because of sex." Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). The Court also held that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'." Meritor Savings Bank v.

Vinson, 477 U.S. 57 (1982). The Court further held that an "employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 755 (1998). The Court also held "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages subject to proof by a preponderance of the evidence." Id. The Court further held "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

The trial court's jury charge was

contrary to Oncale and Meritor Savings Bank because it omitted the essential elements "subject to unwelcome harassment" and harassment must have been based on the sex of the employee". The charge was contrary to Faragher because it permitted the jury to consider the affirmative defense when the undisputed evidence clearly showed that petitioner was subjected to adverse tangible employment action, including but limited to undesirable reassignments, demotion and termination.

CONCLUSION

WHEREFORE, petitioner respectfully urges this court to grant her petition for writ of certiorari and direct the appellate and trial courts and apply the sexual harassment standard established by this Court.

This 20th day of March, 2002

Brenda G. Taylor

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 00-10900-EE, 00-11694-EE, and 00-12440-EE

Filed Oct. 5, 2001

BRENDA G. TAYLOR,

Plaintiff-Appellant,

versus

JAMES W. HODGES,
GENE BUINGER,
BIBB COUNTY PUBLIC SCHOOLS,

Defendants-Appellees.

On Appeal from the United States Court
for the Middle District of Georgia

ON PETITION(S)FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19___, ___F.2d____).

Before: TJOFLAT, DUBINA and DUHE*, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing En banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition (s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____Signed_____

UNITED STATES CIRCUIT JUDGE

*Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 00-10900, 00-11694 & 00-12440

District Court Docket No.
99-00093-CV-DF-5-4

Filed Jul 24, 2001

BRENDA G. TAYLOR,

Plaintiff-Appellant,

versus

JAMES W. HODGES, individually
and in his official capacity as
principal, GENE BUINGER, individually
and in his official capacity as
superintendent, BIBB COUNTY
PUBLIC SCHOOLS,

Defendants-Appellees.

Appeals from the United States Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R.36-1 affirmance without opinion, included herein by reference, is entered as the judgment of this Court.

Entered: July 24, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 00-10900, 00-11694, and 00-1240

District Court Docket No.
99-00093 CV-DF-5-4
Filed July 24, 2001

BRENDA G. TAYLOR,

Plaintiff-Appellant,

versus

JAMES W. HODGES, individually
and in his official capacity as
principal, GENE BUINGER, individually
and in his official capacity as
superintendent, BIBB COUNTY PUBLIC
SCHOOLS,

Defendants-Appellees.

Appeals from the United States Court
for the Middle District of Georgia

(July 24, 2001)

Before TJOFLAT, DUBINA AND DUHE*, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1
(Footnote omitted)

A True Copy - Attested
Clerk, U.S. Court of Appeals
Eleventh Circuit

By: _____
Deputy Clerk
Atlanta, Georgia

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*Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed Jan 19 2000

BRENDA G. TAYLOR,
Plaintiff,

v. C.A.NO. 5:99-CV-93-4(DF)

JAMES W. HODGES, et al.,1
Defendants.
Civil Order File Volume 76, Page 7647

J U D G M E N T

Pursuant to the Jury Verdict dated and filed January 18, 2000,JUDGMENT is hereby entered in favor of Defendants' and against Plaintiff.

This 17th day of January, 2000.

GREGORY J.LEONARD,CLERK

Amy Sanders, Deputy Clerk

(2)

No. 01-1431

Supreme Court, U.S.
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In The

Supreme Court of the United States

BRENDA G. TAYLOR,

Petitioner,

vs.

JAMES W. HODGES, individually and in his official capacity as principal, GENE BUINGER, individually and in his official capacity as superintendent, and BIBB COUNTY SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

RESPONDENTS GENE BUINGER AND BIBB COUNTY SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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3pp

QUESTION PRESENTED

Whether the district court's charge to the jury on the issue of sexual harassment was reversible error.

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ABA Section of Litigation, Model Jury Instructions for Employment Litigation, § 1.04[2] 8, 9

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the writ.

STATEMENT OF THE CASE

This case was tried to a jury over a nine-day period resulting in a verdict and judgment for the Respondents. (R4-188, 189). Petitioner appealed several issues to the Eleventh Circuit Court of Appeals which unanimously affirmed the verdict and judgment of the district court. A Petition for Rehearing En Banc was denied. Petitioner then filed a Petition for Writ of Certiorari.

The Question Presented alleges reversible error with respect to the district court's charge on sexual harassment.

Petitioner misstates the charge that was given to the jury and omits several portions that were given. Below is a transcript of the charge that was given with the omitted portions in bold:

> **The plaintiff in this case claims that the defendant, Bibb County School District, intentionally discriminated against her because of her sex. The defendant denies this charge. The plaintiff in this case claims that she has been the subject of sexual harassment by her employer. In its broadest sense, sexual harassment is any or unwelcome sexual conduct that alters the term or condition of employment.**
>
> **The defendants deny this charge. It is your responsibility to decide whether the plaintiff**

has proved her claim against the defendants by a preponderance of the evidence.

The defendant, Bibb County School District, the employer, is responsible or liable for the actions of plaintiff's supervisor in plaintiff's claim of sexual harassment, if the plaintiff proved by a preponderance of the evidence that, first, Dr. Hodges, the plaintiff's supervisor, made intentional sexual advances to the plaintiff. And, next, that the sexual advances were unwelcomed by the plaintiff. Third, the acceptance or rejection of the sexual advances were an express or implied condition or the receipt of a job benefit or the imposition of a tangible job detriment. And fourth, the plaintiff's reaction to these supervisor's advances, in fact, affected a tangible aspect of her employment.

The plaintiff alleges that she has been forced into a hostile work environment because of sexual harassment. To prevail on such a theory, the plaintiff need not – excuse me. The plaintiff does not need to demonstrate that any substantial job benefits either were conditioned on submitting to hostile sexual harassment or were denied because of refusing to give into such conduct. Rather, to establish a claim of hostile work environment, sexual harassment, the plaintiff must prove by a preponderance of the evidence that her workplace was permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of her employment or create an abusive working environment.

In evaluating hostile work environment sexual harassment claims you must consider the following facts, factors: One, the total

physical environment of the plaintiff's work area. Two, the degree and type of obscenity that filled the environment of the workplace, both before and after the plaintiff arrived. Three, the reasonable expectation of the plaintiff upon entering the environment. Four, the nature of the unwelcome sexual acts or words. Five, the frequency of the offensive encounters. Six, the severity of the conduct. Seven, the context in which the sexual harassment occurred. Eight, whether the conduct was unwelcome. Nine, the effect on plaintiff's psychological well-being. Ten, whether the conduct was physically threatening. Eleven, whether it was merely an offensive utterance, and, twelve, whether it unreasonably interfered with the plaintiff's work performance.

As noted above, the harassment must be unwelcome and hostile. In determining whether the conduct was unwelcome you should consider all of the evidence and base your decision on it. In determining whether the conduct is hostile, the harassment to which the plaintiff was subjected must be sufficiently severe or extensive to alter the conditions of the plaintiff's employment and to create an abusive work environment.

The more severe the conduct the less extensive it must be for you to find that it is hostile. In determining that it is hostile you should consider, one, whether the conduct was verbal is, physical or both. Two, whether the conduct occurred one time or repeatedly. Three, whether the conduct was plainly offensive. Four, whether the alleged harasser was a coworker or a supervisor. Five, whether others

joined in the harassment and, six, whether the harassment was directed at more than one person.

In determining whether a hostile work environment existed you must consider the evidence from the perspective of a reasonable person. This is an objective standard and you must look at the evidence from the perspective of a reasonable person's reaction to a similar environment under similar circumstances.

You cannot view the evidence from the perspective of an overly sensitive person. Rather, you must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as a kind of behavior that would seriously affect the psychological well-being of a reasonable person.

After deciding whether a reasonable person would classify the defendant's behavior as creating a hostile work environment, you must consider the perspective of the plaintiff. If the plaintiff does not subjectively perceive the environment to be hostile and abusive, the conduct has not actually altered the conditions of her employment, and there is not a hostile work environment.

If you find that the plaintiff has proved all of the necessary elements of her hostile work environment sexual harassment claim, then the defendant, Bibb County School District, is liable to the plaintiff, unless you find that said employer proved by a preponderance of the evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior. And that the plaintiff,

> employee, unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

(1st Supp. Vol. 2-213-126-130).

This charge was taken from Devitt, Black, and Wolf, *Federal Jury Practice and Instructions* §§ 104.01 and 104.02 (Supp. 1997) and the ABA Section of Litigation, Model Jury Instructions for Employment Litigation, § 1.04[2]. The charge is an accurate and complete statement of the law.

Over the nine-day jury trial, Petitioner had the opportunity to fully and completely present her case. At the same time, Respondents put forth witnesses who testified at length about Petitioner's lack of credibility, her extreme misconduct at work, and the legitimate reasons for her termination. After hearing all of the evidence, the jury correctly came back with a verdict in favor of the Respondents.

ARGUMENT

The charge at issue is an accurate statement of the law and is not in conflict with this Court's decisions. Moreover, the issue is not of significant importance to warrant review by this Court.

Relying on *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), for the proposition that Title VII sexual harassment must involve discrimination "based on sex,"

Petitioner alleges error by the District Court for not informing the jury that the claim of sexual harassment involved discrimination based on sex. However, the Petition fails to include the sentence in the charge that states, "[t]he Plaintiff in this case claims that the Defendant Bibb County School District intentionally discriminated against her *because of her sex.*" (1st Supp. Vol. 2-213-126) (emphasis added). This contention is totally without merit.

Petitioner next cites *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1982), for the proposition that in order to be actionable, the sexual advances must be "unwelcome." Again, Petitioner fails to include in her Petition the portions of the charge which state that sexual advances must be unwelcome:

> In its broadest sense, sexual harassment is any or *unwelcome* sexual conduct that alters the term or condition of employment.
>
> The defendant, Bibb County School District, the employer, is responsible or liable for the actions of plaintiff's supervisor in plaintiff's claim of sexual harassment, if . . . the sexual advances were *unwelcomed* by the plaintiff.
>
> In evaluating hostile work environment sexual harassment claims you must consider the following facts, factors: . . . Eight, *whether the conduct was unwelcome.*
>
> As noted above, the harassment must be *unwelcome* and hostile. In determining whether the conduct was *unwelcome* you should consider all of the evidence and base your decision on it.

(1st Supp. Vol. 2-213-128) (emphasis added).

Clearly the district court adequately informed the jury of the requirement that the sexual harassment must be unwelcome by the Title VII plaintiff.

Finally, Petitioner cites *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and raises for the first time the argument that the district court should not have charged the jury on the affirmative defense available to an employer defending against a vicarious liability hostile environment sexual harassment claim. The facts simply do not support Petitioner's contention.

Petitioner claims that the offending supervisor took a tangible employment action against her, and thus the affirmative defense set out in *Faragher* should not have been charged. However, the evidence at trial showed that it was the superintendent, not the school principal, who decided to terminate the Petitioner. Thus, whether a tangible employment action had been taken against her by her allegedly sexually harassing supervisor was a disputed fact that went to the jury and was resolved in Respondent's favor.

Even if Petitioner could demonstrate error in the instructions given to the jury, she cannot show that such an error was so substantial that it unduly confused the jury and caused them to find against her. Petitioner has a steep mountain to climb to reverse the district court on an improper jury charge because appellate courts apply "a deferential standard of review to a district court's jury instructions." *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996). An appellate court's review of "a trial court's jury instructions is limited." *Jennings v. BIC Corp.*, 181 F.3d 1250, 1254 (11th Cir. 1999).

In *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997), the Eleventh Circuit stated the rule for reviewing jury charges: "The trial judge is given wide discretion as to the style and wording employed in the instructions so long as they accurately reflect the law. Under this standard, we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. We will reverse the district court because of an erroneous instruction only if we are left with a substantial and eradicable doubt as to whether the jury was properly guided in its deliberations." (Internal citations omitted) (Emphasis supplied).

Jury charges can be technically imperfect but still not require reversal. *Alexander v. Fulton County*, 207 F.3d 1303, 1332 (11th Cir. 2000). Even if jury instructions contain law that should not be charged, there will be no reversible error if the "charge taken as a whole did not unduly confuse the jury . . . ." *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). Likewise, isolated clauses may be incorrect, ambiguous, incomplete, or otherwise subject to criticism, but the case will not be reversed if the charge, taken as a whole, properly expressed the applicable law. *Busbee v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991).

Prior to giving the charge, the district court observed that "[we] are encouraged by the appellate courts to use standard charges." (1st Supp. Vol. 2-213-100). The charge on Title VII and quid pro quo sex harassment came from Devitt, Blackmar and Wolf, *Federal Jury Practice and Instructions*. The charge on Title VII and hostile environment sex harassment was taken from the ABA Section of

Litigation, Model Jury Instructions for Employment Litigation. The charges given are tried and true, and are indisputably an accurate statement of the law as applied to the evidence presented to the jury. No error occurred.

CONCLUSION

Respondents respectfully request that this Court deny the writ as it is clear that no error occurred in the charge that was given to the jury and the petition is without merit.

Respectfully submitted,

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